

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY**

**TEVA BRANDED PHARMACEUTICAL  
PRODUCTS R&D, INC., and  
NORTON (WATERFORD) LTD.,**

**Plaintiffs,**

**v.**

**CIPLA., AUROBINDO PHARMA  
LLC, AUROBINDO PHARMA USA,  
INC., and AUROLIFE PHARMA  
LLC,**

**Defendants.**

**CIVIL ACTION NUMBER:**

**20 Civ. 10172 (JXN)**

**FINAL PRETRIAL CONFERENCE**

**Martin Luther King Building & U.S. Courthouse  
50 Walnut Street  
Newark, New Jersey 07101  
Thursday, November 10, 2022  
Commencing at 10:32 a.m.**

**B E F O R E:**

**THE HONORABLE JULIEN XAVIER NEALS  
UNITED STATES DISTRICT JUDGE**

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1 (PROCEEDINGS held in open court before The Honorable  
2 JULIEN XAVIER NEALS, United States District Judge, at 10:32  
3 a.m.)

4 THE COURTROOM DEPUTY: All rise.

5 The Honorable Julien Xavier Neals presiding.

6 THE COURT: Good morning, Counsel.

7 Please be seated.

8 THE COURTROOM DEPUTY: We are on the record in  
9 *Teva Branded Pharmaceutical, Products R&D, Inc., et. al. v.*  
10 *Cipla, LTD, et. al;* case number 20 Civ. 10172.

11 THE COURT: Counsel, your appearances, please.

12 MR. WALSH: Good morning, your Honor.

13 William Walsh, of Walsh Pizzi O'Reilly Falanga, on  
14 behalf of plaintiff Teva.

15 With me is my co-counsel from Williams & Connolly, and I  
16 will let them introduce themselves.

17 MR. GREENBLUM: Good morning, your Honor.

18 Ben Greenblum, from Williams & Connolly for Teva; and  
19 with me are my colleagues, Ben Picozzi and Kat Kayali, also  
20 from Williams & Connolly.

21 THE COURT: Good morning, Counsel.

22 MR. KANG: Good morning, your Honor.

23 Gene Kang, from Rivkin Radler LLP, for defendant Cipla  
24 Limited. I am joined by co-counsel, William Adams, Bill  
25 Zimmerman, Brandon Smith, and Jonathan Bachand from Knobbe

1 Martens.

2 THE COURT: Good morning.

3 MR. CASIERI: Good morning.

4 Chris Casieri, McNeely, Hare & War, for Aurobindo.

5 THE COURT: Good morning.

6 MR. CASIERI: Good morning.

7 THE COURT: All right.

8 Counsel, we are here for the housekeeping, the long  
9 awaited housekeeping in this case.

10 Just with the matter of housekeeping, I note that there  
11 was a file pretrial that was provided today, a revised  
12 pretrial.

13 I also note that we have the motion pending with regard  
14 to Counts 5 and 11 as to Cipla's answer, defenses and  
15 counterclaim and also with regard to the open matter as to the  
16 Markman decision.

17 With regard to the final pretrial, someone either partly  
18 summarize for the Court what was in today's final pretrial,  
19 what the modifications were to the last pretrial order?

20 MR. GREENBLUM: Good morning, your Honor.

21 Ben Greenblum, again from Williams & Connolly.

22 The pretrial order, I believe it was submitted -- the  
23 revised one was submitted on Friday, and I think it was entered  
24 by Magistrate Judge Hammer yesterday.

25 In substance, it -- I would describe it as making two

1 changes, one is that it reflects where the parties are at --  
2 and by parties I mean Teva and Cipla, not Aurobindo -- with  
3 respect to this dispute on the '156 patent that your Honor will  
4 be hearing more about this morning. And so we sort of tee'd  
5 that up in the revised pretrial order to say if it's in, here's  
6 what happens. If it's not in, here is what happens.

7 The second issue is that we informed the defendants that  
8 there were a few claims of patents that are remaining in the  
9 case that we will not be proceeding on at trial, and so the  
10 parties just agreed to remove the to and the fro, if you will,  
11 about those claims from the pretrial order.

12 Those are the only substantive changes I can recall.  
13 I'm happy to be corrected if --

14 MR. ADAMS: That's right, your Honor.

15 William Adams, for the Cipla defendants.

16 I think that's accurate.

17 I mean, there are some housekeeping, when this hearing  
18 occurred, that was updated, those types of things.

19 I think substantively that is correct.

20 THE COURT: All right. Counsel, you just had  
21 mentioned with regard to the '156 patent, did you want to have  
22 a discussion about that now?

23 Was there some things that the parties wanted to point  
24 out with regard to that now?

25 MR. GREENBLUM: We were hoping to present brief

1 argument, if it was acceptable to the Court.

2 And my colleague, Mr. Picozzi, will be handling that for  
3 Teva whenever the Court is prepared to hear it.

4 THE COURT: I would actually propose, unless the  
5 parties have different thoughts on it, to have arguments on  
6 '156 now, as a matter of fact.

7 MR. GREENBLUM: That's acceptable, certainly, to Teva,  
8 your Honor.

9 MR. ADAMS: That's fine, your Honor.

10 THE COURT: All right.

11 So you can proceed on that.

12 MR. PICOZZI: Good morning, your Honor.

13 THE COURT: Good morning.

14 MR. PICOZZI: Ben Picozzi, for the plaintiff.

15 THE COURT: Good morning.

16 MR. PICOZZI: As we said in our briefs, we think that  
17 this issue is straightforward.

18 The relative facts are -- the relevant facts are not in  
19 dispute here.

20 Everyone agrees that for the only potential basis that  
21 this Court could possibly have for jurisdiction over the '156  
22 patent is the possibility that a judgment for Cipla on that  
23 patent could be used to trigger the forfeiture of the first  
24 applicant's exclusivity.

25 Everyone also agrees that to do that Cipla needs to

1 complete a complicated jigsaw puzzle of events. And everyone  
2 also agrees that Cipla can't do that based on the patents and  
3 claims that it has currently pending.

4 As we've laid out in our briefing, there are at least  
5 three patents that Cipla would need to get judgments in order  
6 for it to even have a hope of triggering forfeiture, that is  
7 the '156 patent, which is the patent at issue in Teva's motion,  
8 but also the '509 and '510 patents.

9 The parties agreed and this Court entered an order more  
10 than a year ago that dismissed their claims as to the '509 and  
11 '510 patents.

12 Those patents are out of this case and Cipla does not  
13 have any pending litigation anywhere in the world as to those  
14 patents.

15 And that is a fundamental problem for Cipla because  
16 courts from the Supreme Court on down have applied what is  
17 commonly referred to as the rule against piecemeal litigation.  
18 And that means that jurisdiction does not exist unless, based  
19 on pending litigation, a requested judgment would have some  
20 kind of effect that would completely resolve the parties'  
21 dispute, the case in controversy in question.

22 Now, Cipla's response to that is to say that this is a  
23 special Hatch-Waxman case and so a different result should be  
24 obtained here.

25 The problem for Cipla, though, is that there is no

1 special rule for Hatch-Waxman cases.

2 In fact, you know, we think it's ironic that they spent  
3 a lot of time trying to distinguish the nonHatch-Waxman cases  
4 because many of the cases that were relied in our opening  
5 brief, to give you a couple of examples, the *Dey* case, the  
6 *Janssen* case as well as the *Impax* case, which are cited on  
7 pages 7 through 10 of our opening brief, as well as the *Caraco*  
8 case, which is discussed in the opposition and reply briefs,  
9 are all Hatch-Waxman cases.

10 And in each of those cases, the Courts applied a rule  
11 that is consistent with the rule against piecemeal litigation.

12 And, you know, unless the Court needs any clearer  
13 indication that the same rules apply in Hatch-Waxman cases as  
14 in the ordinary course, it need look no further than the  
15 *Dey Pharma* case, which is quoted, in relevant part, both in our  
16 opening brief as well as page 12 of Cipla's opposition.

17 And in that case, the Court said upholding jurisdiction  
18 simply eliminating one barrier, by which it meant one patent,  
19 is sufficient for declaratory judgment, quote, so long as  
20 litigation is also pending that would eliminate the other  
21 barriers.

22 In other words, in that case, Hatch-Waxman case, the  
23 Court directly applied the rule against piecemeal litigation  
24 and found that jurisdiction existed in that basis because the  
25 declaratory judgment plaintiff there did, in fact, have pending



1 litigation as to all of the relevant patents.

2 That's, of course, not the case here where Cipla would  
3 need further additional nonfiled litigation on the '509 and  
4 '510 patents for it to meet the jurisdictional limit.

5 You know, as further evidenced that the ordinary rules  
6 apply in Hatch-Waxman cases, the federal circuit then turned  
7 around and reaffirmed that principle in the *AbbVie* case, which  
8 was not the Hatch-Waxman case. It was an ordinary patent case  
9 that also involved the contract license dispute.

10 In that case, the federal circuit held that because a  
11 judgment on just the patent claim without a further litigation  
12 over the underlying contractual dispute would have no effect on  
13 the parties ultimate dispute, that jurisdiction did not exist.  
14 And as support for that rule, it quoted that very same passage  
15 from *Dey* and said that because the parties' case or controversy  
16 could not be resolved based on pending litigation, that the  
17 Court didn't have jurisdiction and, therefore, dismissal was  
18 required.

19 One last brief point, your Honor, unless your Honor has  
20 further questions, throughout their opposition, Cipla argues  
21 that this Court should hear arguments, should maintain  
22 proceedings because it's too late; because the interest of  
23 efficiency and fairness would be served for this Court to hear  
24 argument.

25 Frankly, your Honor, you know, our client and theirs

1 have different views of the sequence of events, but,  
2 ultimately, none of that matters.

3 Subject matter jurisdiction is a threshold question  
4 about the Court's constitutional authority to hear the matter.

5 It is not about whether it would be convenient for Cipla  
6 or any other party to obtain an advisory opinion as to the  
7 '156 patent.

8 THE COURT: Thank you, Counsel.

9 MR. PICOZZI: Thank you, your Honor.

10 MR. ZIMMERMAN: Good morning, your Honor.

11 Bill Zimmerman from Knobbe Martens.

12 I think the parties are in agreement as to the relevant  
13 facts.

14 There isn't a factual dispute here.

15 The '156 patent was in the case.

16 At the pretrial conference, Teva granted us a covenant  
17 not to sue.

18 There was a dispute over the form of the judgment. And  
19 then Teva moved to dismiss.

20 Now, Teva originally argued that the covenant not to sue  
21 by itself divests this Court of jurisdiction.

22 I think the parties have all agreed that in view of  
23 *Caraco* 527 F.3d 1278, that argument simply doesn't hold water.  
24 The federal circuit had held that the presence of a covenant in  
25 the Hatch-Waxman context is not enough.

1 And so I don't think we have a real dispute there.

2 The dispute is: Does there have to be pending  
3 litigation on the '509 and '510 patents?

4 And I'm going to give you some context on that, and then  
5 go through the law on it.

6 And the context is the '509 and '510 patents were  
7 originally in this case at an early stage.

8 They were dismissed in May of '21 when there were still  
9 numerous patents in play, and so it was an early stage.

10 The '156 patent has been in the case in its entirety.  
11 They filed the covenant at the pretrial conference, said we  
12 would be dismissing it, and then there were two weeks  
13 afterwards.

14 So there was no reason to file a DJ on the '509 and '510  
15 patents. The timing of that DJ didn't impact anything.  
16 Certainly, not with respect to the '156 patent because it was  
17 in the case.

18 And so where does Cipla have to go to clear the path to  
19 get to the market?

20 Counsel described it as a complicated jigsaw puzzle.

21 It is really very straightforward.

22 They have to win on the patents that we are going to go  
23 to trial on starting Monday and that includes the '156 -- or  
24 doesn't depending on your ruling.

25 We have to obtain a judgment on the '156 patent, a final

1 judgment of noninfringement or invalidity either in this case  
2 or a follow-on case.

3 And then we have to get a judgment on the '509 and '510  
4 patents, which Teva has already conceded they are not going to  
5 assert against us, and they've already told us we don't  
6 infringe the '156 patent.

7 So those last two pieces should be straightforward and  
8 easy.

9 The question is whether the '156 patent is at issue in  
10 this case.

11 Now, there's no dispute that there isn't current pending  
12 litigation on the '509 and '510 patents, but Cipla doesn't  
13 believe that that's required under the all circumstances test  
14 for subject matter jurisdiction under the federal circuit  
15 precedent.

16 Now, counsel referred to three cases, *Dey*, *Janssen* and  
17 *Impax*, and I want to draw the distinctions very clearly.

18 In *Janssen*, the ANDA filer had stipulated to  
19 infringement and validity of one of the patents.

20 So the Court said based on those actions, there is no  
21 circumstances under which you can get a challenge to clear all  
22 of the patents because you foreclosed one of them.

23 And then in the *Impax* case, *Impax* had agreed to be bound  
24 by a judgment on one of the patents in another case. And the  
25 Court said because you agreed to this, there's no circumstances

1 under which you can get relief as to all of the patents.

2 Cipla has not taken any actions which precluded from  
3 getting relief under the '509 and '510 patents.

4 And counsel, I think, will agree to that.

5 And so we're left with the question of does there  
6 actually have to be litigation at this moment on the '509 and  
7 '510 patent?

8 And there is a statement in the *Dey* case that  
9 acknowledges that in that case there was litigation pending on  
10 the other patent. And the statement is, as we have held under  
11 materially identical facts in *Caraco*, simply eliminating one  
12 barrier is sufficient so long as litigation is also pending  
13 that could eliminate the other barriers.

14 So in that case and in *Caraco*, there were parallel cases  
15 pending. But both of those cases involved parallel actions  
16 that happened at early stages. Somebody filed to clear the  
17 path. Because there was no dispute, they were going to have to  
18 have all of those patents in play.

19 And there's no dispute here that we need all the patents  
20 in play.

21 But if you read the collection of cases, *Caraco*,  
22 *Janssen*, *Impax* and *Dey*, part of the reason they allowed  
23 declaratory judgment in the Hatch-Waxman context is to prevent  
24 gaming of the system. They don't want the scenario where  
25 brands selectively don't assert patents so that they can use

1 the regulatory scheme to prevent approval. That's why all of  
2 those cases allowed declaratory judgment jurisdiction in this  
3 context.

4 And they talk about the gamesmanship that leads to the  
5 decisions.

6 So we have a situation here -- and I haven't found it in  
7 any other case -- most likely *Caraco*, *Janssen*, and *Impax* are  
8 all early stages of the litigation.

9 Here we have the situation where the patent we're  
10 fighting over is trial ready. The parties have everything in  
11 the pretrial brief. We've spent two and a half years on this  
12 patent. We're ready to go to trial Monday.

13 If that patent doesn't get tried, it's going to be  
14 another two years after we file a declaratory judgment on that  
15 patent and the '509 and '510 patent.

16 We are going to repeat everything we have just done, and  
17 Teva is going to get rewarded for the gamesmanship of dropping  
18 that patent at the pretrial conference.

19 That's exactly what declaratory judgment in this context  
20 is meant to prevent.

21 Now, there's a question about the piecemeal  
22 adjudication.

23 I want to clear up -- the Hatch-Waxman scheme is  
24 described in the *Caraco* case very well, and they say it's an  
25 artificial act of infringement for purposes of establishing

1 jurisdiction in the federal courts, and the statute is 35  
2 U.S.C. 271(e) (2).

3 The entire drug litigation for Hatch-Waxman is done  
4 under the specter of hypothetical situations.

5 Normally, in a patent case -- and they refer to them as  
6 ordinary patent cases -- somebody sells a product, and you are  
7 trying to stop them.

8 We all know what the conduct is.

9 Hatch-Waxman creates this artificial system where you  
10 file your application with the FDA, and in 45 days you start a  
11 litigation. In parallel with that, the FDA is reviewing your  
12 application, and so the entirety of the world may change in the  
13 context of your litigation.

14 The FDA may require you to tighten specs. The brand may  
15 change the label necessitating changes in the ANDA. There may  
16 be new guidance requirements that require changes to the ANDA.  
17 Everybody agrees the ANDA can change.

18 And what happens in the litigation may ultimately be  
19 rendered moot by the fact that you don't get approval or the  
20 approval requirements change.

21 So this is a context where the entirety of the  
22 litigation is speculative and could be rendered moot.

23 But, nevertheless, Congress has said we're going to  
24 strike this balance and give you this artificial jurisdiction  
25 so we can get generic drugs to the market faster.

1           So it is a unique context. It is different, and I want  
2 to be very clear. If this Court interprets the precedent as  
3 requiring a case on the '509 and '510 patents, we haven't done  
4 that yet. It is coming, but there was no reason to speed that  
5 along. If it's not required, then we all agree we're going to  
6 trial Monday on the '156 patent.

7           And I want to talk about what happens if we get this  
8 wrong just to be sure we're all on the same page.

9           If the Court says there's jurisdiction, and we try it  
10 and it turns out there wasn't, then nobody is worse for wear.  
11 We're having the trial anyway. It's already tee'd up. The  
12 work is already done. Nobody is harmed.

13           If there is jurisdiction and we don't try that patent,  
14 there is no way to fix it for Cipla. We will be two years down  
15 the road, find out we should have tried it, and there's no way  
16 to make up for that time.

17           And Teva benefits from the delay and Cipla is harmed.

18           So if there is any question that it's close, it should  
19 be that we try the patent to prevent harm because nothing harms  
20 Teva by trying the patent.

21           Unless you have further questions, your Honor.

22           THE COURT: Counsel, the dismissal as to Cipla for  
23 '509 and '510, that was in June of 2021?

24           MR. ZIMMERMAN: Yes.

25           THE COURT: When that occurred, what was Cipla's



1 position?

2 Are you saying at that point they didn't know exactly  
3 which patents were going to be required for ultimately to prove  
4 the case?

5 MR. ZIMMERMAN: No, your Honor.

6 At that point in the case, we were still early on in  
7 discovery, and Cipla said, okay, we will get these out. We  
8 will narrow the universe.

9 At that point, we expected that the first filer would  
10 launch and trigger their own exclusivity. So we didn't think  
11 we were going to have to clear the path.

12 We're now a year and a half later.

13 The first filer hasn't launched.

14 The FDA has reviewed Cipla's ANDA, and we're getting  
15 closer and closer to approval. And so the parking issue has  
16 become real.

17 And given that we hadn't expended a bunch of time and  
18 effort on the '509 and '510 patents, we let them go at the  
19 early stage. We are now realizing, okay, we knew we were going  
20 to need the DJ on them as we got closer to trial and the first  
21 filer hadn't launched. And so we're also going to need that on  
22 the '156, but we've already expended all the effort on the '156  
23 patent.

24 That's why we're fighting so hard to keep it in.

25 THE COURT: Just one other point, and I don't need to

1 necessarily know the backstory to it, but when the stipulations  
2 were entered as to Aurobindo, those had a provision for  
3 noninfringement?

4 MR. ZIMMERMAN: For Aurobindo's stipulation?

5 THE COURT: Yes.

6 MR. ZIMMERMAN: I believe it did.

7 THE COURT: Okay.

8 Thank you, Counsel.

9 MR. ZIMMERMAN: Thank you, your Honor.

10 THE COURT: Counsel.

11 MR. PICOZZI: Your Honor, I would like to begin where  
12 Mr. Zimmerman left off, which was on the point about fairness  
13 and gamesmanship.

14 Mr. Zimmerman just admitted that Cipla's predicament is  
15 not the result of any gamesmanship on the part of Teva, but  
16 calculations that Cipla itself made about what patents might or  
17 might not be important when it agreed to dismiss those claims.

18 More fundamentally, though, each of the points that  
19 Mr. Zimmerman raised during his presentation was an attempt to  
20 add an additional exception to the rule against piecemeal  
21 litigation that is not supported by a single case.

22 There is no exception, for example, on the basis of  
23 fairness or efficiency and, in fact, the case law says the  
24 opposite.

25 We cite several cases on the final page of our reply

1 brief that explain why no such exception exists.

2 And those cases include the *Hercules* case, which is a  
3 Supreme Court case holding that because subject matter  
4 jurisdiction is jurisdictional, that fairness concerns and  
5 equity concerns don't matter.

6 The same is true of the First Circuit case that we cite  
7 as well as the District of Arizona case, which in a patent case  
8 very similar to this one, the Court dismissed for subject  
9 matter jurisdiction based on a covenant not to sue that was  
10 issued on the eve of trial.

11 The second punitive exception that Mr. Zimmerman  
12 referred to was that there was some distinction between early  
13 stage versus late stage litigation and that posture makes a  
14 difference.

15 In fact, no such exception exists, and none of the cases  
16 that anyone has cited refer to any such exception.

17 The final exception that Mr. Zimmerman refers to is --  
18 really goes back to the point of efficiency. That, well, we  
19 should hear argument on the '156 patent because it is tee'd up,  
20 and we may file DJ actions on the '509 and '510 patent.

21 Again, you know, there is not a single case in which the  
22 fact pattern supports that particular distinction. And,  
23 tellingly, Mr. Zimmerman does not say anything at all about the  
24 *AbbVie* case, which is a case by the federal circuit that  
25 interpreted *Dey* and applied the ruling in *Dey* that there must

1 be pending litigation that would grant finality -- final  
2 conclusion to the case or controversy.

3 And in that case, again, the Court did not make any  
4 exceptions based on any of the ones that Mr. Zimmerman has held  
5 on.

6 Unless your Honor has any further questions...

7 THE COURT: Counsel, with regard to the requirement  
8 that there must be pending litigation, are there any exceptions  
9 to that?

10 MR. PICOZZI: None -- certainly none that are in any  
11 of the cases that either party have cited, and I'm not aware of  
12 any.

13 THE COURT: Thank you, Counsel.

14 MR. GREENBLUM: Your Honor, if I could just add one  
15 thing to the question that you asked at the end of  
16 Mr. Zimmerman's argument about the stipulation that Aurobindo  
17 entered, just to crystalize it for the Court, because we  
18 discussed this and I handled it for Teva with Judge Hammer.

19 The stipulation that Aurobindo agreed to and it was so  
20 ordered by the Court as to those patents and as to the '156  
21 provided judgments but not findings based on evidence. And  
22 that was -- the parties here were unable to agree, that is Teva  
23 and Cipla. Cipla wanted those findings, and we didn't think  
24 they were appropriate or justified. And Judge Hammer said,  
25 well, look, I can't order a stipulation that the parties don't

1 agree to. And we understand that, but I just wanted to  
2 crystalize for the Court. We remain amenable to a stipulation  
3 that would enter a judgment on the '156 in the form that we had  
4 submitted to Judge Hammer and submitted to Cipla without the  
5 findings language.

6 So I just wanted to be responsive to the Court's query  
7 about stipulation.

8 THE COURT: So that language then would read along the  
9 lines of that the Court entered judgment of noninfringement as  
10 to counts so-and-so?

11 MR. GREENBLUM: Yes, your Honor.

12 THE COURT: Okay.

13 Mr. Zimmerman, anything further?

14 MR. ZIMMERMAN: Your Honor, I just want to address two  
15 points.

16 The first one was there seemed to be a statement that  
17 this is a problem of Cipla's own making. And I want to be very  
18 clear on that.

19 There was absolutely no dispute between the parties  
20 until Teva dropped the '156 patent at the pretrial conference.

21 Their actions are what necessitated this whole thing.  
22 There was no problem at all. We were happy to try the  
23 '156 patent.

24 It is exclusively Teva's conduct.

25 And the next point is the distinction they are drawing

1 about you have to have pending litigation. That distinction --  
2 so if I would have walked into the clerk's office this morning  
3 and dropped off a '509 and '510 complaint, Teva's position is  
4 that, okay, there is jurisdiction. Everything is fine. We can  
5 try the patent on Monday.

6 If I walk out of this hearing and drop it in the  
7 courtroom -- in the clerk's office, they are saying there is no  
8 jurisdiction because you didn't do it before the hearing.

9 That can't be what the rule is with respect to  
10 jurisdiction in this context.

11 Thank you.

12 THE COURT: One question for both parties.

13 Regarding pending litigation, if the '156 was an aspect,  
14 even taking '509 and '510 for example, so this case is not  
15 finally concluded. So there's been no final determination in  
16 this case.

17 Pending litigation means that the claims themselves  
18 still have to be active, I take it, is what the parties would  
19 be saying as well.

20 MR. PICOZZI: That's correct, your Honor.

21 MR. ZIMMERMAN: That is correct, your Honor.

22 THE COURT: Okay.

23 While we're on the point of '156, just to review, I know  
24 you have identified this specifically in the pretrial order  
25 then, "the if and if not." So with regard to if it remains in

1 the case, what the impact is and if it's out of the case, what  
2 the impact is.

3 MR. GREENBLUM: Yes, your Honor.

4 THE COURT: And that also talks about the claims  
5 meaning construction and things as well?

6 MR. GREENBLUM: I don't know if -- I think the  
7 pretrial order would specify the claims that would need to be  
8 construed.

9 I don't recall how much it discussed what the Court  
10 would need to do about it, but that would be in the Markman  
11 briefing before the Court.

12 THE COURT: Understood.

13 Just in terms of those claims, if '156 is out, what  
14 remains in the case as far as proof issues, but I'm sure that's  
15 spelled out in here.

16 MR. GREENBLUM: That is certainly spelled out,  
17 your Honor. Yes.

18 THE COURT: Okay.

19 With regard to '156 in or out, do the parties have an  
20 idea -- and you probably spelled it out in here as well --  
21 what impact that would have on the trial schedule?

22 MR. GREENBLUM: I know that at the conference we had  
23 in front of Judge Hammer in September, Cipla indicated they  
24 thought it would be very difficult to fit the trial into the  
25 four days that the Court has allotted if the '156 was in.

1           So I think we will get it done on the schedule that the  
2 Court gives us.

3           We think it would certainly add a number of issues that,  
4 for the reasons Mr. Picozzi explained, we think are  
5 unnecessary. And it would certainly make it more difficult to  
6 get it done in the allotted time.

7           I think we probably agree with Cipla about that.

8           THE COURT: Okay.

9           MR. ADAMS: Your Honor, the '156 patent, I think, is  
10 pretty streamlined.

11           If left in the case, the covenant not to sue on it, we  
12 have a very clear noninfringement position on it. I think it  
13 doesn't change the fact that we can get this trial done in four  
14 days. I don't think it adds another day. I don't think that's  
15 the issue. So I think as we talked about the pretrial  
16 conference, it can still be done in four days.

17           THE COURT: You won't get cut off if it ends up going  
18 past four days because we anticipated. We allotted more time  
19 than that as well. This is just more for the Court's own  
20 purposes in terms of anticipation.

21           So you are not going to be foreclosed one way or another  
22 if your estimates or guesstimates are wrong with regard to it  
23 being in or out.

24           MR. GREENBLUM: One thing I just want to comment,  
25 your Honor, in response to Mr. Adams is that it kind of goes



1 back to the stipulation issue.

2 If all they needed was a judgment of noninfringement, I  
3 agree with Mr. Adams. It wouldn't take up any time at trial.  
4 They want findings. They want to put in evidence. They want  
5 to put on expert testimony. Those are the things that are  
6 necessary before the Court would make findings. That takes  
7 more than -- you know, that's time. That's testimony. That's  
8 evidence that the Court would have to hear.

9 MR. ADAMS: Your Honor, we do want a finding, and let  
10 me just clarify why.

11 The Hatch-Waxman statute doesn't just say a judgment. It  
12 says a finding of invalidity of noninfringement. So that's why  
13 when we talk about why we can't agree to that language, Cipla  
14 needs that to trigger the first filer, as Mr. Zimmerman  
15 presented that.

16 But I think in terms of the procedure at trial, as  
17 Mr. Zimmerman said, the '156 patent is ready to go.

18 In my opinion, the analysis of that '156 patent is  
19 pretty streamlined. We have a covenant not to sue on it. It  
20 is a straightforward, noninfringement position.

21 Again, your Honor, I don't think it adds a lot of time  
22 to the trial. I think we still get the trial done in four  
23 days.

24 MR. GREENBLUM: At the risk of having the Court  
25 reverse itself on you won't cut us off, the revised pretrial

1 order, as I read Cipla's position, reflects that if the Court  
2 exerts jurisdiction over the '156 and keeps it in the case,  
3 they are going to put on evidence asking the Court to make  
4 findings about invalidity on which a covenant not to sue would  
5 not be relevant.

6 So there would need to be claim construction from the  
7 Court, testimony from experts, documents, and argument about  
8 validity and that -- you know, so I don't think that the issue  
9 would be as simple as at trial here is the covenant, you're  
10 done, you can make findings.

11 You can't make findings based on a covenant, but you  
12 certainly can't make findings about invalidity.

13 THE COURT: With regard to that, a finding of  
14 noninfringement is not enough; Cipla is looking for more than  
15 that.

16 MR. ADAMS: Your Honor, a finding of noninfringement  
17 is enough for Hatch-Waxman to trigger.

18 The Hatch-Waxman statute says finding a noninfringement  
19 or invalidity. So this case is -- again, until right up to the  
20 pretrial conference, Cipla is ready to do both noninfringement  
21 and invalidity. That is why it is reflected in the pretrial  
22 order.

23 But, again, a finding of noninfringement, which I do  
24 believe is very straightforward in this case on the '156, is  
25 all Cipla needs from your Honor, and that's what we are looking

1 for.

2 THE COURT: The reason the Court asks, and unless I'm  
3 missing something in the discussion, I understood that Teva was  
4 offering a stipulation that provided similar language that they  
5 provided to Aurobindo, which did have noninfringement language  
6 in it.

7 MR. GREENBLUM: It had language about a judgment of  
8 noninfringement, not about findings based on evidence.

9 THE COURT: So we need a findings based on evidence,  
10 not a judgment of.

11 MR. ADAMS: Your Honor, that's right.

12 It's not because Cipla is trying to make this thing  
13 complicated or hard.

14 It's we're tracking the statute.

15 The Hatch-Waxman statute says a finding of  
16 noninfringement or invalidity. We are looking for that  
17 finding.

18 Congress thought about this. In that statute, it says  
19 the parties could reach a consent order. The parties could  
20 agree to that language, submit it to the Court, and the Court  
21 could sign it.

22 So Congress understood that. They said there could be a  
23 consent order where the parties sign that says a finding of  
24 judgment and noninfringement. We asked for that. Teva refused  
25 to give us that, but that's what we are looking for, finding of

1 noninfringement.

2 MR. GREENBLUM: Our position is that the stipulations  
3 should just follow the courses, all of the prior ones, which  
4 didn't make findings, because we don't think courts make  
5 findings based upon stipulations. Courts hear evidence in the  
6 box and make findings.

7 THE COURT: Not to beat the point, but to beat the  
8 point, if the Court were to enter an order proposed by the  
9 parties that has some sort of findings language, there would  
10 have been no formal findings by the Court.

11 So I don't want to rehash the whole discussion that  
12 happened before Judge Hammer, but I'm realizing that maybe we  
13 might even had a discussion with counsel off the record between  
14 now and Monday. I may just look at the record just to get a  
15 little bit more understanding of what the language was that  
16 prevented the barrier to '156.

17 At any rate, we will be prepared to render a decision on  
18 '156 on Monday.

19 Was there anything else with regard to '156, or are we  
20 okay with '156?

21 MR. GREENBLUM: No, your Honor.

22 MR. ADAMS: No, your Honor.

23 THE COURT: So we also have a Markman opinion that's  
24 prepared that the Court is also prepared to render on Monday,  
25 and I anticipate that there will, obviously, be some impact on

1 your trial -- not preparation because I am sure you prepared on  
2 everything -- but just in terms of how the trial proceeds once  
3 you have the actual construction terms.

4 With regard to those two decisions that we will be  
5 rendering on Monday, we will have the opportunity to discuss in  
6 more detail than in terms of what impacts, if there's any  
7 additional concerns as far as counsel have in terms of proof  
8 presentation, order of your case, or anything else.

9 Now with regard to any particular issues, any particular  
10 problems from a practical standpoint in terms of going forward  
11 with trial, availability, any issues at all?

12 MR. GREENBLUM: No, your Honor, we are prepared to  
13 proceed on Monday.

14 I guess one question I would have for the Court is:  
15 Does the Court anticipate issuing the Markman and '156 rulings  
16 in the morning?

17 The question, the reason I ask is it will certainly  
18 effect our opening presentation. I am sure it will effect my  
19 colleagues' opening presentation, and we might need to just  
20 sort of work together with the Court on the timing of that to  
21 make sure we're not talking to you about things that are out or  
22 are in that we didn't anticipate being in.

23 THE COURT: We anticipate Monday morning or  
24 possibly...

25 And as a matter of fact, my dutiful law clerk just

1 reminded me, that because we've had these issues with the  
2 motion and with Markman, is that you would do your actual  
3 openings on Wednesday instead of Monday to give you an  
4 opportunity to digest what we provide to you.

5 MR. GREENBLUM: One suggestion I would make without  
6 talking to my team, which is always some peril, is to start on  
7 Tuesday so that we could try to fit it in. Because witnesses  
8 have come in and if we start it on Wednesday, I think under the  
9 current schedule we wouldn't finish next week.

10 So if we got the rulings on Monday, we would be prepared  
11 to be with your Honor Tuesday morning. I think that would suit  
12 Teva.

13 THE COURT: We can accommodate Tuesday.

14 MR. GREENBLUM: Thank you, your Honor.

15 One further minor housekeeping issue that that raises is  
16 that under the current pretrial order, the parties were to  
17 exchange disclosures of their opening slides to one another to  
18 make sure there is no objections on Saturday evening before  
19 Monday morning trial.

20 We would propose to exchange those Monday evening after  
21 we've had a chance, both sides, to digest the Court's rulings  
22 and exchange those Monday evening before Tuesday morning start.

23 THE COURT: That's fine with the Court as long as the  
24 parties are fine with that as well.

25 MR. ADAMS: Your Honor, I think part of the issue is

1 just the whole reason we agree upfront to exchange in time, it  
2 is generally 48 hours, is so that the parties can understand  
3 the evidence that they are going to present and they can  
4 understand our evidence and be prepared on that. I think  
5 Monday night is too late given where we're at.

6 I think we all know both sides what potential  
7 constructions are going to be. Right? We've argued under  
8 theirs all through the case. They argued under ours all  
9 through the case. Our experts have opined on that. So I think  
10 we do know. I think now it would just be narrowing.

11 So I would suggest, if we're going to move the trial  
12 from Monday to Tuesday, we just move that date from Saturday to  
13 Sunday for the exchanges.

14 MR. GREENBLUM: Let me try to cut through this.

15 If we're going to get decisions from the Court on Monday  
16 morning, how about instead of Monday evening, Monday at  
17 3 o'clock? I mean, the Court's constructions are going to  
18 materially affect my opening, to be honest.

19 THE COURT: Again, knowing what the universe of proofs  
20 are, if you did your exchange on Saturday and then you just did  
21 modifications after you received some rulings on Monday at  
22 least so there's not a complete surprise. I would assume that  
23 there would be things that would be coming out rather than new  
24 stuff going in.

25 MR. GREENBLUM: I think that that's true with respect

1 to the '156.

2 I think it's not true with respect to constructions  
3 because the constructions the Court give us are going to be  
4 more than a guide to in or out.

5 They are going to be a guide to how we present evidence  
6 to the Court.

7 MR. ADAMS: Your Honor, I would say his first  
8 compromise, I think, would make sense, sometime earlier on  
9 Monday instead of trying to, you know, do Monday night.

10 I so think sometime earlier, maybe noon on Monday, would  
11 be a better time frame than trying to wait until Monday night.

12 MR. GREENBLUM: We are down to three hours,  
13 your Honor.

14 So let's see if we can close the deal.

15 THE COURT: It sounds like it.

16 MR. GREENBLUM: I am not in the habit of asking the  
17 Court what time it is going to issue its rulings.

18 How about we agree on, you know, within four or five  
19 hours of receiving the Court's rulings on the docket?

20 MR. ADAMS: That's great, your Honor.

21 THE COURT: Sold.

22 MR. GREENBLUM: Thank you, your Honor.

23 THE COURT: Anything else with regard to our  
24 housekeeping?

25 MR. ADAMS: There is a couple of housekeeping items



1 from Cipla's standpoint.

2 The first one, I understand there was a stipulation  
3 filed this morning. Cipla wasn't served with that stipulation.

4 As I understand it, it impacts Teva and Aurobindo.

5 So, I guess, the first point I would make is we haven't  
6 seen it so we don't know what's in it. That is the first  
7 point.

8 The second one, as I understand it, it is a stipulation  
9 that Aurobindo will not be participating in the case, and  
10 that's ordered by your Honor.

11 I understand Aurobindo had some witnesses.

12 From our perspective, those witnesses shouldn't show up  
13 at trial. We -- Cipla doesn't control them. Their depositions  
14 shouldn't be used at trial.

15 So we want to get some clarity to make sure that is what  
16 occurs with respect to the Aurobindo witnesses.

17 THE COURT: With regard to that, Counsel.

18 MR. GREENBLUM: Just to address that, your Honor, with  
19 respect to what it is, it's, as I think I described to  
20 Mr. Zimmerman before Court, it's a stipulation to stay and be  
21 bound. That's not uncommon in these types of cases.

22 Essentially, Aurobindo is agreeing to live with whatever  
23 judgment the Court issues with respect to the dispute between  
24 Teva and Cipla. That happens all the time.

25 I agree with Mr. Adams that they won't be participating

1 in the trial. They won't be putting on their own argument, but  
2 that's what it is. It is fairly common, and I understood from  
3 the Court's clerk that the Court would be entering that.

4 Unless the Court has questions, I can move on to the  
5 second point Mr. Adams made about witnesses.

6 THE COURT: You can move on to the second point, and  
7 then we will see what Mr. Adams has to say.

8 MR. GREENBLUM: Sure.

9 With respect to the second point, there were depositions  
10 of Aurobindo's witnesses. There is a schedule in the pretrial  
11 order for disclosure of designations of deposition testimony.  
12 We will meet that schedule, and we will disclose any deposition  
13 testimony that we intend to submit to the Court.

14 We do expect that that will include testimony from  
15 Aurobindo witnesses.

16 Cipla was given notice of those depositions and had an  
17 opportunity to cross-examine if it wished. So I don't think  
18 there will be any surprise about what's in there.

19 The Court should recall that there's no dispute in this  
20 case that for infringement purposes the products of Aurobindo  
21 and Cipla are the same. So that's why witness testimony from  
22 Aurobindo would come in.

23 If there's to be a dispute about the admissibility of  
24 that, we're happy to meet and confer and to tee anything up for  
25 the Court that we need to, but they were given notice of the

1 depositions.

2 THE COURT: Okay.

3 MR. ADAMS: Your Honor, if I may respond on that  
4 second point, the notice of the deposition is one thing.  
5 There's testimony in there that has nothing to do with Cipla.  
6 It's not related to any issue in the case that's relevant if  
7 Aurobindo is out of the case.

8 So I think from our perspective there's -- we have our  
9 witnesses. Cipla will bring our witnesses. They are welcome  
10 to cross-examine our witnesses. But playing deposition  
11 testimony from a party who is no longer in the case just  
12 doesn't make sense.

13 Certainly, it doesn't make sense in the context of  
14 what's still relevant in the case and also in terms of the  
15 timing and the way the case plays out. Having additional  
16 deposition testimony from a party who is no longer in the case  
17 doesn't make sense.

18 MR. GREENBLUM: If the objection is relevance, I am  
19 very confident we are going to clear that threshold, but I'm  
20 happy to meet and confer with Mr. Adams once we make those  
21 designations in a timely fashion. And if we still have a  
22 dispute about relevance, we will tee that up to the Court.

23 THE COURT: Perfect.

24 MR. GREENBLUM: One other housekeeping matter,  
25 your Honor, is I recall that under the local rules of the Court

1 there's an obligation of defendants in these types of cases to  
2 regularly update their correspondence with the Food and Drug  
3 Administration about their application. And I just wanted to  
4 make sure that we continue to have a complete such file from  
5 Cipla as we head into trial on Tuesday.

6 MR. ADAMS: Your Honor, I'm happy to respond to that.  
7 We have.

8 There is a local rule, seven days. We just literally  
9 checked with the client. They told us no updates.

10 I think this goes back to the point that Mr. Zimmerman  
11 was making. This is a fluid process; right? It's not like  
12 there is set product, and it's done.

13 But we have. We checked with them, and we will continue  
14 to do that and meet the local rule, seven-day requirement.

15 THE COURT: Thank you.

16 MR. ADAMS: And while I'm here, your Honor, I think  
17 there's -- the issue of deposition, I think it is more of a  
18 housekeeping question of what your preference would be, whether  
19 you would prefer to have the deposition played live at trial,  
20 whether you are looking for those depositions to be submitted  
21 on the written record.

22 The reason I raise it, number one, is timing-wise.  
23 Number 2, obviously, our experts are going to be here. They  
24 are going to want to hear what the testimony is and be able to  
25 provide their opinions and view that.

1           So we're just looking for your guidance in terms of your  
2 preference for how the deposition designations are handled.

3           THE COURT: I am a little loathe to try and dictate to  
4 counsel how they intend to present them.

5           I would ask that you confer to say is this going to be  
6 presented via video or is this just going to be presented in  
7 written form, so the Court will know as well that we will have  
8 the necessary apparatus for you.

9           From my perspective, I don't have a preference one way  
10 or another in terms of the testimony coming in.

11           The bigger concern is whether there's going to be any  
12 objection to what's coming in. Again, I'm going to rely on  
13 counsel to meet and confer on that and just let the Court know  
14 if there is going to be any issues with regard to that.

15           MR. GREENBLUM: Understood, your Honor.

16           MR. ADAMS: Thank you, your Honor.

17           THE COURT: Were there any other housekeeping items  
18 for defense, for Cipla?

19           Those are your items?

20           MR. ADAMS: That was our items, your Honor.

21           MR. GREENBLUM: No, your Honor.

22           Thank you.

23           THE COURT: All right.

24           Tuesday's start time will be 9 o'clock.

25           We're here by 8:30, so the courtroom will be open by

1 8:30.

2 That will also give us an opportunity to confer if we  
3 need to have any sort of conference before we start. That will  
4 also give us the opportunity, I don't want counsel to be overly  
5 pressed because I know you're going to be speaking on Monday as  
6 well with regard to different forms of testimony and other  
7 things.

8 So if we need to take an opportunity to conference first  
9 before we go forward, you can let us know that on Monday. We  
10 will be prepared to do that as well.

11 MR. GREENBLUM: Thank you, your Honor.

12 MR. ADAMS: Thank you, your Honor.

13 THE COURT: Mr. Zimmerman.

14 MR. ZIMMERMAN: Your Honor, just one logistical point  
15 that I think would help all of the parties from planning.

16 I think everybody had planned to be here from Monday to  
17 Thursday. We're now starting on Tuesday.

18 Does the Court plan to hold Court in this matter on  
19 Friday? So that we know what our schedule looks like. Because  
20 if you tell us four days, I think we can work together to do  
21 Tuesday, Wednesday, Thursday, Friday and have the trial done if  
22 the Court is available.

23 I wanted to know what your schedule looked like in terms  
24 of whether Friday was an available trial day?

25 THE COURT: I believe we are available Friday.

1 Yes, we are available Friday.

2 MR. ZIMMERMAN: Then I think counsel can get together,  
3 and we can try this case in four days.

4 THE COURT: Again, we're not going to overly force you  
5 to compress your case to do it. But if counsel feels they can  
6 do that, and I think that based on what I'm seeing in the case  
7 and seeing the level of preparation that was done, I would  
8 think that we probably can get it done in four days.

9 In the event that we have to go further, we will.

10 MR. ZIMMERMAN: And we appreciate the indulgence of  
11 not being rushed, your Honor. I've worked with counsel for  
12 years. We have done this many times. It's one of those that  
13 I'm very sure if we work together, we will present an orderly  
14 trial to get this done in the four-day period.

15 THE COURT: Monday, we will have a 10 o'clock start  
16 time on Monday.

17 You are starting on Tuesday.

18 We will let you know when the opinions are available on  
19 Monday once they are filed electronically.

20 MR. GREENBLUM: Thank you, your Honor.

21 MR. ADAMS: Thank you, your Honor.

22 MR. GREENBLUM: In other words, you don't need us here  
23 at 10:00 a.m. on Monday? We will just wait until we hear from  
24 the Court.

25 THE COURT: No, I don't need you Monday.

1 Was there anything else?

2 MR. GREENBLUM: No. We appreciate the Court's time  
3 today.

4 MR. ADAMS: Nothing else, your Honor.

5 THE COURT: I appreciate your time as well and the  
6 preparation and your offers to have further discussion so that  
7 we can make sure that we streamline things as much as we can.

8 Thank you both.

9 Thank you all, rather.

10 THE COURTROOM DEPUTY: All rise.

11 (Whereupon the proceedings are adjourned at 11:22 a.m.)

12 \* \* \*

13 FEDERAL OFFICIAL COURT REPORTER'S CERTIFICATE

14

15 I certify that the foregoing is a correct transcript  
16 from the record of proceedings in the above-entitled matter.

17

18 /S/ Melissa A. Mormile RDR, CCR, CRCR

11/10/2022

19 Official Court Reporter

Date

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